No. 84-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DATA GENERAL CORPORATION,
Petitioner,

v.

DIGIDYNE CORPORATION and
FAIRCHILD CAMERA AND INSTRUMENT CORPORATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION AND BRIEF AMICUS CURIAE ON BEHALF OF CONTROL DATA CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION ON BEHALF OF CONTROL DATA CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Control Data Corporation ("Control Data") moves under Supreme Court Rule 36.1 for leave to file the accompanying brief as amicus curiae in support of the Petition. Consent of petitioner is herewith filed with the Clerk. Respondent has declined to consent.

The decision below materially increases the reach of *per se* antitrust tying violations. If left to stand, the decision will have adverse consequences throughout the computer-related in-

dustries in the United States. Moreover, adverse consequences will flow to any commercial transaction in any industry where a copyrighted work is sold in conjunction with another product or service.

Respectfully submitted

CONTROL DATA CORPORATION

By_____

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The matter before the Court seeks review and reversal of the decision of the United States Court of Appeals for the Ninth Circuit in *Digidyne Corp.* v. *Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *reversing* 529 F. Supp. 801 (N.D. Cal. 1981), and *affirming* 490 F. Supp. 1089 (1980). Copies of these opinions are Appendices A, B and C of Data General's Petition.

I—QUESTION PRESENTED

Whether, to sustain a finding of a *per se* violation of Sherman 1 (15 USC § 1) or Clayton 3 (15 USC 14), a computer program subject to the United States Copyright Law

is *ipso facto* impressed with economic power regardless of the exclusionary power, if any, of the copyright and without examination of its anti- or pro-competitive effect in any relevant market.

II—INTEREST OF AMICUS CURIAE

Throughout Control Data's 27-year history, it has designed, manufactured and marketed programmable digital computer "hardware" and the closely related "software" (i.e., computer programs) which are necessary, in conjunction with the "hardware", to provide a unitary functional machine. Control Data is well known and respected as the creator and manufacturer of some of the most powerful scientific computers in the world. Control Data also offers computer-related services. For example, Control Data develops and markets software for a variety of computer hardware systems, and also acquires rights to use and market software owned by others.

Software is a *sine qua non* for meaningful operation of modern computers. Indeed, "operating system" software defines the basic *modus operandi* of a given computer system as perceived by the user who then acquires or develops "application" software to cause the computer system to perform a particular task. At least initially, the computer's central processing unit (CPU) and its "operating system" software are typically developed in a coordinated effort.

Software/hardware development costs are very high, especially for developing operating systems software. In our free enterprise society, industry survival demands that there simply *must* be protection against unauthorized software/hardware copying for a period of time to recover costs and earn a profit. Control Data, like other companies, relies heavily for such protection on the U.S. copyright laws and on the copyright laws of foreign countries via treaties such as the Universal Copyright Convention. Like other companies, Control Data markets its

computer systems and software, and markets services based on either or both, in a variety of ways.

Although Control Data does not market software in a manner identical to Data General (as its marketing is described in the *Digidyne* decisions), there is some similarity. A more compelling reason to support Data General's petition for review and for reversal of the decision below is the decision's potential for causing serious harm to a basic industry in which the United States still holds international leadership.

III—SUMMARY OF ARGUMENT

The court below has misinterpreted this Court's prior decisions concerning the prerequisites for *per se* tying violations. The result is, in reality, an irrebuttable presumption that one possesses sufficient economic power in a tying market to support a *per se* violation whenever the tying product is copyrighted. This result was caused by a failure of the court below to understand the copyright law, and the true nature of a copyright and its ordinarily modest and usually non-existent potential for excluding others from a market. Such failure has prompted an unreasonable application or interpretation of this Court's decision in *United States v. Loews, Inc.*, 371 U.S. 38 (1962). The Ninth Circuit decision, if permitted to stand, will have the far reaching, unanticipated and absurd anti-trust consequence of conferring economic power on every copyrighted work of authorship including, in addition to computer programs, books, pamphlets, musical or dramatic works, motion pictures and sound recordings, to name a few.

IV—ARGUMENT

A. The Decision Below Creates An Effectively Irrebuttable Presumption Of Economic Power Based Merely On Copyright In The Tying Market

Under this Court's prior decisions, before any *per se* antitrust tying violation can be found the facts *must* show economic power in the tying market (computer programs in

this case) "sufficient . . . to appreciably restrain free competition in the market for the tied product . . ." (computer CPU's in this case) *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969) (Fortner I). In *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) (Fortner II), this Court explicitly considered economic power in a tying market (credit) and found insufficient market power to support any *per se* tying violation ("nothing more than a willingness to provide cheap financing in order to sell expensive houses").

Here the district court conducted a trial on the sufficiency of Data General's economic power in the tying market. By considering a number of factors the district court found insufficient economic power to exist but the Ninth Circuit has now reversed, disregarding such factual market analysis in favor of an irrebuttable presumption of sufficiency where the tying product happens to be copyrighted. This result was reached in large part by placing an unreasonable construction on *United States* v. *Loews, Inc.*, 371 U.S. 38 (1962) and by making an erroneous assumption that the U.S. copyright law provides an equivalent degree of economic power to that provided by the United States patent laws:

> ". . . The RDOS copyright established both the distinctiveness of RDOS and a legal bar to its reproduction by competitors. 'The requisite economic power is presumed when the tying product is patented or copyrighted.' [citing *Loew's*] The copyright confers upon defendant 'some advantages not shared by the competitors in the market for the tying product' [citing *Fortner II*] . . .' [P]er se prohibition is appropriate if anticompetitive forcing is likely. For example, if the government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power' *Jefferson Parish Hospital*, 104 S.Ct. at 1560 . . ." (from the decision below, 734 F.2d at 1341-1342)
>
> "The court erroneously imposed the burden on plaintiff. The RDOS copyright created a presumption of economic power sufficient to render the tying arrangement illegal *per se*. The burden to rebut the presumption shifted to defendant." (from the decision below, 734 F.2d at 1344)

Thus, under the Ninth Circuit's analysis the mere existence of copyright *ipso facto* raises a presumption of sufficient economic power and immediately shifts the burden of proof.

In turn, the Ninth Circuit also makes it impossible to rebut such a presumption successfully. Citing *Loew's*, the Ninth Circuit curtly dismisses the availability of competing substitutes as immaterial (734 F.2d 1345) and interprets market analysis language from *Fortner II* as simply inapplicable unless fungible goods (e.g., credit) are involved (734 F.2d at 1345). Using this new Ninth Circuit analysis, the tying market is reduced to an irreducible minimum consisting only of the one specific copyrighted product. Attempts to rebut the presumption become futile by definition.

This harsh result is based upon cited language from other cases and upon the Ninth Circuit's own comments erroneously equating the exclusionary power conferred by patents with that conferred by copyright law. Using the Ninth Circuit approach, any copyrighted textbook by any given author *itself* defines a tying market wherein that textbook is presumed to have sufficient economic power for a *per se* antitrust violation. It does not matter that substitute textbooks of the same general type may be available in a larger defined market, supposedly because they are not precisely fungible goods.

B. Patent and Copyright Laws Compared

Patent and copyrights are grounded in the United States Constitution at Article I, Section 8 as follows:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

Under this Constitutional provision Congress has from time to time enacted patent statutes, of which the most recent has the following crucial provisions at 35 U.S.C. §§ 101, 103 and 154:

> "Whoever invents or discovers any *new* and useful *process, machine, manufacture,* or *composition of matter,* or any new and useful improvement thereof, may obtain a patent therefor. . . .[1]
>
> "A patent may *not* be obtained . . . *if the differences* between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been *obvious* . . . to a person having ordinary skill in the art . . ." [2]
>
> "Every patent shall contain . . . a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to *exclude* others from *making, using* or *selling* the invention throughout the United States . . . " [3]

On the other hand the copyright law at 17 U.S.C. § 106 and 17 U.S.C. § 501(a) provides in part:

> ". . . the owner of copyright . . . has the exclusive rights . . .
>
> (1) to *reproduce* the copyrighted work in *copies* . . .;
>
> (2) to prepare a derivative work [4] . . . *based upon* the copyrighted work".[5]
>
> "Anyone who violates any of the exclusive rights . . . is an infringer . . .[6]

The fundamental power in commerce of a patented invention greatly exceeds the power of a copyrighted work. A

[1] 35 U.S.C. § 101.
[2] 35 U.S.C. § 103.
[3] 35 U.S.C. § 154.
[4] 17 U.S.C. § 101: "A 'derivative work' is work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'."
[5] 17 U.S.C. § 106.
[6] 16 U.S.C. § 501(a).

patent covers a *new* and *unobvious* process, machine, manufacture or composition of matter, and it excludes others from *making, using* or *selling.* Copyrights are far less exclusionary than patents. Absent *deliberate* copying or copying to produce a derivitive work, copyrights have *no* exclusionary power whatever.[4] [6] This is a critical threshold in reaching any conclusion under the Sherman Act.[7]

Copyright of itself is simply incapable of conferring economic power or the presumption of economic power under the Sherman Act. A copyrighted *work may* provide such a capability; however that result must depend on other factors, such as whether alternatives are available. In *Fortner I, Fortner II,* and more recently in *Jefferson Parish Hospital District No. 2* v. *Hyde,* ____U.S.____, 104 S. Ct. 1551 (1984), this Court severely limited, if it did not reject, the "uniqueness" test relied on as the source of sufficient economic power in *Loew's, Inc.* and in *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131 (1948) (also relied on by the Ninth Circuit). Even if *Loew's* has some continuing viability, its rationale cannot be blindly applied to computer software. In *Loew's* the Court was faced with a situation where the market could not provide alternatives for the tying product. The tying product was a motion picture of

[7] Even in the case of patents this Court in addressing a counterclaim alleging monopolization under Sherman § 2, expressly rejected the notion that the mere existence of a patent conferred economic power on its holder such as to result in *per se* illegality under the Sherman Act.

> "To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition. It may be that the device—knee-action swing diffusers—used in sewage treatment systems does not comprise a relevant market. There may be effective substitutes for the device which do not infringe the patent. This is a matter of proof . . ." *Walker Processing Equip., Inc.* v. *Food Mach. & Chem. Corp.,* 382 U.S. 172 (1965).

We therefore have a direct holding that even patents—potentially far more exclusionary than copyrights, as pointed out above—do not *in and of themselves* confer economic power in a relevant market.

unusual fame, "Gone With The Wind" featuring matinee idol Clark Gable and Vivian Leigh—and featuring Gable's then-shocking articulation of the words "Frankly, Scarlett, I don't give a *damn.*"

By contrast, in the case of operating systems software, equivalent software either *is* available or can be independently written as an original work of authorship without infringing upon *any* copyright. Copyright protects only the author's *form* of expression, *Mazer* v. *Stein*, 347 U.S. 201 (1954). Any attempt to assert copyright protection of an idea, concept or the like is unthinkable in view of 17 U.S.C. 102(b).[8] See also *M. Bryce & Associates, Inc.* v. *Gladstone*, 319 N.W. 2nd 907 (Wis. App. 1981), *cert. denied*, 74 L.Ed 2d 202 (1982), which compares software copyright protection (*form* of expression of the computer program) and trade secrecy protection (the concept underlying the program).

Furthermore, in the absence of copying there can be no copyright infringement, *Mazer* v. *Stein*, 347 U.S. 201. As so picturesquely put by Learned Hand in *Sheldon* v. *Metro-Goldwyn Pictures*, 81 F.2d 49, 54 (2nd Cir. 1936), *cert. denied*, 298 U.S. 669 (1936):

> We are to remember that it makes no difference how far the play was anticipated by works in the public desmesne . . . defendants have filled the record with earlier instances . . . as though, like a patent, a copyrighted work must be not only original, but new. That is not however the law as is obvious from the case of maps or compendia, where later works must necessarily be anticipated . . . But . . . it is plain beyond peradventure that anticipation as such cannot invalidate a copyright. Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an 'author'; but if by some magic a man who had

[8] 17 U.S.C. § 102(b):
"(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

> never known it were to compose anew Keat's Ode on a Grecian Urn, he would be an 'author' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keat's . . . But though a copyright is for this reason less vulnerable than a patent, the owner's protection is more limited, for just as he is no less an 'author' because others have preceded him, so another who follows him, is not a tort-feasor unless he pirates his work. . . . "

In summary, *Jefferson Parish* recognizes that simply selling separate products together is not illegal *per se*. It also acknowledges that the fact that a product may be unique does not necessarily mean that it confers economic power. The most that a copyright stands for is that the copyrighted work is original to the author. Copyright, therefore, does not, indeed cannot of itself, confer economic power under *Jefferson Parish* or even signify novelty or uniqueness under *Loew's*.[9]

C. Some Effects of a Per Se Presumption

The purpose of Article I Section 8 of the U.S. Constitution is to promote the progress of science and the useful arts. This Court has so stated on many occasions and in many ways. For example, *Mazer* v. *Stein*, 347 U.S. at 219:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'."

[9] The court below similarly erred in its superficial reference to trade secrecy (". . . RDOS could not be utilizing defendant's trade secrets [citing in fn3 to a supposed "admission" of this by one of defendant's officers who, if he made such a statement, was obviously untrained in the law of copyright or trade secret] 734 F.2d at 1342). If, as has been demonstrated, applying the label "copyright" to a work fails to establish economic power in the work, *a fortorari* applying the tag "trade secret" to a product does nothing to confer economic power where none otherwise exists. In the case of trade secrets, even the modest exclusionary potential conferred by the U.S. Copyright Law is absent.

The threat of *per se* antitrust tying violations being used as a cudgel to demand licenses under operating systems software runs counter to this purpose and philosophy. Moreover, in enacting the 1976 Copyright Law,[10] Congress legislated several compulsory license requirements,[11] none of which applies to the statutory category of literary works [12] within which software (computer programs) falls. Yet, some try to misuse the antitrust law as a compulsory licensing tool to obtain indirectly what Congress did not legislatively confer.

For at least 50 years [13] after an original work of authorship has been fixed in any tangible medium, copyright protection subsists whether the author likes it or not[12] [13] and whether or not the work is published, and whether or not the copyright is

[10] Public Law 94-533, 90 Stat. 2541 as amended Public Law 94-517, 94 Stat. 3028.

[11] In addition to the phonorecord compulsory license under the amended Copyright Law of 1909, which was carried over in amended form into the 1976 Act of 17 USC § 115, in 1976 Congress enacted new compulsory license provisions at 17 USC § 111 (cable television) and § 116 ("jukebox" musical works) and § 118 (broadcasting of musical and artistic works by public broadcasting entitites).

[12] 17 U.S.C. § 102(a): "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings."

[13] 17 U.S.C. § 302(a): "In General—*Copyright* in a work created on or after January 1, 1978, *subsists* from its creation and, except as provided by the following subsections, endures for a term consisting of *the life of the author and fifty years* after the author's death."

registered.[14] Therefore the Ninth Circuit's decision results in an irrebuttable presumption of sufficient economic power to support a *per se* tying violation by the owner of copyright in every original computer program, book, pamphlet, musical or dramatic work, motion picture, sound recording . . . for 50 or more years in each case.[15]

The foregoing results from the Ninth Circuit's attempt to avoid review of anti- or pro-competitive effects in the relevant market(s), by simply latching onto the word "copyright" (and "trade secrecy" for good measure) to automatically confer sufficient economic power for a *per se* shortcut. But, as this Court stated in *Broadcast Music Inc.* v. *Columbia Broadcasting Systems Inc.*, 441 U.S. 1, 19 (1979):

> "Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would *not* expect any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraints by the Sherman Act would not exist at all or would exist only as a pale reminder of what the Congress envisioned."

IV—CONCLUSION

Loew's is authoritative in factual situations like those in which it arose but it does not create an irrebuttable presump-

[14] 17 U.S.C. § 408(a): *Registration Permissive.*—At any time during the subsistence of copyright *in any published or unpublished work*, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Subject to the provisions of section 405(a), such *registration is not a condition of copyright protection.*"

[15] The fact that a copyright owner can dedicate his/her copyright to the public and perhaps escape the presumption is irrelevant and totally irreconcilable with this Court's articulation of the purpose of Article I Section 8. See *Mazer* infra.

tion (in practical effect) of economic power sufficient to render a tying arrangement illegal *per se* merely because a copyright exists. This Court should grant the Petition for writ of certiorari so that such an attempted change in antitrust law and resulting debilitation of the copyright law to perform its constitutional and congressionally envisioned roles in commerce can be given the scrutiny it deserves.

Respectfully submitted

CONTROL DATA CORPORATION

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CERTIFICATE OF SERVICE

I certify that three copies of Control Data Corporation's Motion and Brief Amicus Curiae has been served on counsel of record for Data General Corporation, Digidyne Corporation and Fairchild Camera and Instrument Corporation by first class mail this 19th day of November, 1984.

_____

Counsel for Control Data Corporation